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S.T., Appellant)	
)	
and)	Docket No. 17-0790
)	Issued: May 22, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Long Beach, CA, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 28, 2017 appellant filed a timely appeal from an October 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 24, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On May 25, 2010 appellant, then a 52-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging injuries to her left shoulder, neck, and lower back due to her job requirements which included bending, twisting, and lifting while casing mail as well as

¹ 5 U.S.C. § 8101 *et seq.*

walking and carrying a mailbag on her left shoulder while delivering mail. She did not stop work at that time.

In November 2010, OWCP initially accepted appellant's claim for adhesive capsulitis of her left shoulder, sprain of her left shoulder/upper arm (rotator cuff), and chondromalacia of her left knee patella.²

In December 2009, appellant began to receive medical treatment from Dr. Edward Mittleman, an attending Board-certified orthopedic surgeon. On January 14, 2010 Dr. Mittleman indicated that she reported that she had developed left shoulder pain approximately eight months prior and later developed neck, low back, and lower extremity symptoms. He diagnosed cervical disc syndrome, lumbar disc protrusion with radiculopathy, and left shoulder tendinitis and impingement, and indicated that appellant could perform modified work with restrictions including no lifting more than 20 pounds.³

Appellant also received treatment from Dr. Charles Herring, a Board-certified orthopedic surgeon, and Dr. Hosea Brown, III, a Board-certified internist. On September 10, 2010 Dr. Herring examined her and recommended that she undergo left shoulder surgery. Dr. Brown authored a November 8, 2010 report containing the diagnoses of left shoulder tendinitis with radiculopathy, full-thickness left rotator cuff tear, multilevel cervical disc herniations with radiculopathy, and lumbar disc protrusion with radiculitis. He determined that appellant was totally disabled from work.

In a November 23, 2010 report, Dr. Gary L. Baker, an attending Board-certified anesthesiologist and pain medicine physician, noted that appellant complained of neck pain radiating into her left upper extremity and low back pain radiating into her right lower extremity. Dr. Baker diagnosed several conditions, including cervical radiculopathy, lumbar radiculopathy, patellar chondromalacia, and the left shoulder conditions of adhesive capsulitis, internal derangement, and rotator cuff sprain/strain.

OWCP referred appellant for a second opinion examination to Dr. Ghol B. Ha'Eri, a Board-certified orthopedic surgeon. It asked him to provide an opinion regarding her ability to work.

In a December 8, 2010 report, Dr. Ha'Eri indicated that appellant presently complained of neck pain radiating into her left upper extremity, left shoulder pain, and lower back pain radiating down to her left thigh. He diagnosed rotator cuff tear/tendinitis, glenohumeral joint chondromalacia, and mild acromioclavicular joint degeneration of the left shoulder, disc degeneration with mild protrusions at C4 through C7, and disc protrusion (posterior right paracentral) at L4-5. Dr. Ha'Eri advised that appellant's cervical condition was not related to employment factors. He determined that she had partial disability due to her work-related left shoulder and back conditions since December 17, 2009. Dr. Ha'Eri completed a work capacity evaluation form (Form OWCP-5c) on December 8, 2010 in which he indicated that appellant could

² Appellant periodically stopped work beginning in late-2010 and received compensation on the daily rolls for intermittent periods of disability beginning November 27, 2010.

³ Dr. Mittleman continued to treat appellant on a periodic basis and he provided a similar account of her condition and disability in reports dated May 14 and October 11, 2010.

perform modified-duty work on a full-time basis with restrictions, including no lifting, pushing, or pulling more than 10 pounds, no walking for more than two hours per day, no standing for more than two hours per day, and no engaging in squatting, kneeling, or climbing.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Ha'Eri, who found appellant capable of modified-duty work, and Dr. Brown, who found that she was totally disabled from work. It referred her to Dr. Edward Green, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she had disability due to an employment-related condition.

In a May 5, 2011 report, Dr. Green discussed appellant's factual and medical history and detailed his physical examination findings. He provided several diagnoses including cervical spine degenerative disc disease, left shoulder impingement, left rotator cuff tear, and lumbar spine degenerative disc disease. Dr. Green indicated that appellant's cervical condition was due to preexisting osteoarthritis and degenerative disc changes. He advised that the prior findings on physical examination and diagnostic testing showed that she had been totally disabled between early-November and early-December 2010, but that she only had partial disability after that time period. Dr. Green completed a Form OWCP-5c on May 5, 2011 in which he indicated that appellant could perform modified-duty work on a full-time basis with restrictions, including no lifting, pushing, or pulling more than 10 pounds, no walking for more than two hours per day, no standing for more than two hours per day, and no engaging in squatting, kneeling, or climbing.⁴

Appellant stopped work in mid-2011 and she filed a claim for compensation (Form CA-7) alleging that she had disability for the period July 27 to September 16, 2011 due to her accepted work injuries.

On December 29, 2011 Dr. Herring performed OWCP-approved left shoulder surgery including arthroscopic rotator cuff repair and subacromial decompression.

By decision dated April 18, 2012, OWCP denied appellant's claim for wage-loss compensation for the period July 27 to September 16, 2011, finding that she failed to submit medical evidence sufficient to establish employment-related disability for this period.

On September 14, 2012 appellant requested reconsideration of OWCP's April 18, 2012 decision.⁵ She submitted a September 6, 2012 report from Dr. Mittleman, who asserted that her present cervical condition was employment related and recommended that OWCP accept the conditions of lumbar disc protrusion and cervical spine degenerative disease.

⁴ OWCP requested that Dr. Green provide a supplemental report clarifying whether he felt that appellant's continuing cervical and lumbar conditions were related to her work. On March 22, 2012 Dr. Green responded and indicated that her cervical and lumbar conditions were preexisting and nonindustrial in nature. He posited that appellant's disability was not related to an employment-related condition.

⁵ OWCP had received an August 2, 2012 letter in which appellant's union representative requested that the accepted conditions be expanded to include several cervical conditions.

In a December 4, 2012 duty status report (Form CA-17), Dr. Herring indicated that appellant could return to full-time work with restrictions including lifting/carrying no more than seven pounds.

By decision dated December 13, 2012, OWCP denied modification of its April 18, 2012 decision denying appellant's claim for wage loss for the period July 27 to September 16, 2011. However, in another December 13, 2012 decision, it expanded the accepted conditions to include displacement of lumbar intervertebral disc without myelopathy.

In February 2013, appellant returned to part-time work for the employing establishment and, in May 2013, she began working in the full-time position of customer care agent.⁶ By decision dated June 20, 2014, OWCP adjusted her wage-loss compensation to reflect her ability to earn wages as a customer care agent.

On August 20, 2013 appellant requested reconsideration of OWCP's December 13, 2012 decision which had denied wage-loss compensation and, by decision dated October 28, 2013, OWCP denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In a September 15, 2014 report, Dr. Basimah Khulusi, an attending Board-certified physical medicine and rehabilitation physician, posited that appellant's cervical condition was related to factors of her federal employment.

In January 2015, appellant began working approximately 6 hours per day (instead of approximately 10 hours per day) on each of her four workdays per week in accordance with the recommendation of Dr. Khulusi.

OWCP referred appellant's case to Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It asked him to indicate whether her cervical condition was related to employment factors.

In a report dated February 25, 2015, Dr. Simpson noted that the medical evidence of record showed that appellant had multilevel cervical degenerative disc disease with disc protrusion and some degree of central and foraminal stenosis. He recommended that OWCP not expand the accepted conditions to include a cervical condition at the current time. Dr. Simpson indicated that there was conflict in the medical opinion evidence regarding whether appellant sustained an employment-related cervical condition and he recommended that she be referred to an impartial medical specialist.

Appellant continued to work approximately six hours per day on each of her four workdays per week, and she filed claims for compensation for partial disability covering the period January 9 to April 3, 2015.

⁶ Appellant worked four days per week and each of the workdays were approximately 10 hours long.

In an April 9, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim for partial disability for the period January 9 to April 3, 2015.

Appellant submitted an April 6, 2015 report in which Dr. Khulusi diagnosed various left shoulder and low back conditions as well as multilevel cervical disc herniations with radiculopathy. Dr. Khulusi recommended that she continue with her modified work without specifying the number of hours she could work per week.

In a May 4, 2016 report, Dr. Khulusi expressed her opinion that appellant's cervical conditions were employment related and requested that OWCP expand the accepted conditions to include cervical spine degenerative disease (aggravation), cervical spine chronic myofascial strain, and cervical radiculopathy. She posited that appellant's duties as a city letter carrier over the course of 10 years, including carrying a heavy mail satchel, using her arms to sort/case mail, and pushing mail hampers, caused the diagnosed cervical conditions. Dr. Khulusi noted that appellant demonstrated cervical spasms and limited range of motion of her cervical spine, and posited that she should not work more than six hours per day. She asserted that, because OWCP had not accepted "the diagnosis of the neck condition," it had continued to deny "the disability compensation."

By decision dated August 10, 2015, OWCP denied appellant's claim for disability compensation for the period January 9 to April 3, 2015. It found that she failed to submit medial evidence, with objective findings, which established that she had increased disability for this period due to a worsening of her accepted employment conditions.

In an appeal request form dated July 27, 2016, received on the same date, appellant requested reconsideration of OWCP's August 10, 2015 decision.

Appellant submitted an August 24, 2015 report from Dr. Brown who reported that she complained of left shoulder, low back, and neck discomfort which she rated at the level of 7 out of 10. Dr. Brown reported his findings upon physical examination, including cervical spasms, and diagnosed various left shoulder, cervical spine, left knee, and low back conditions. He found that appellant had returned to modified work on August 24, 2015 in accordance with restrictions delineated in a Form CA-17 he completed on that date. In an August 24, 2015 Form CA-17, Dr. Brown diagnosed left rotator cuff tear and indicated that she could return to work, but had to sit and stand as needed and take a 15-minute break every two hours.⁷

In an October 5, 2015 report, Dr. Khulusi reported physical examination findings for appellant's left shoulder and low back and diagnosed various left shoulder, cervical spine, left knee, and low back conditions. She indicated that appellant could return to modified work on October 5, 2015 and noted that she would continue her "on the same restrictions on the job." In January 26 and April 26, 2016 reports, Dr. Khulusi provided similar assessments of appellant's medical condition. In the January 26, 2016 report, she indicated that appellant could return to

⁷ In an August 16, 2016 report, Dr. Brown provided a similar assessment of appellant's medical condition, but he did not provide an opinion on her ability to work.

modified work on January 26, 2016 and noted that she would continue her “on the same restrictions on the job.”

In an October 13, 2015 report, Dr. Herring provided physical examination findings for appellant’s left shoulder and diagnosed several left shoulder and cervical spine conditions. With respect to her work status, he indicated, “Please see the [Form] CA-17.” On January 12, 2016 Dr. Herring noted that appellant exhibited left shoulder weakness, cervical muscle tightness/tenderness, and limited range of motion of the cervical spine. Regarding her work status, he noted, “Modified duty per [Form] CA-17 of primary treating physician.”⁸

In a report dated July 21, 2016, Dr. Khulusi asserted that she had already provided the medical arguments which showed that appellant’s cervical conditions were caused by her work at the employing establishment. She noted that Dr. Simpson, an OWCP medical adviser, had indicated on February 25, 2015 that there was a conflict in the medical opinion evidence regarding whether she sustained an employment-related cervical condition and recommended that she be referred to an impartial medical specialist. Dr. Khulusi noted that, because OWCP had not followed Dr. Simpson’s recommendation, there was a conflict in the medical opinion evidence regarding whether appellant sustained an employment-related cervical condition which not been resolved. She recommended that appellant be evaluated by an impartial medical specialist.

Appellant also submitted notes of physical therapists describing physical therapy sessions in 2015 and 2016.

By decision dated October 25, 2016, OWCP denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument she submitted in support of her reconsideration request was irrelevant or immaterial to her claim for increased disability due to an accepted employment condition. In particular, OWCP indicated that the question of whether appellant had an employment-related cervical condition was not currently before it on reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁹

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ If OWCP determines

⁸ In an August 2, 2016 report, Dr. Herring noted that appellant had retired from the employing establishment. A document from September 2016 indicates that appellant had applied for benefits from the Social Security Administration.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

that at least one of these requirements is met, it reopens and reviews the case on its merits.¹¹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹²

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.¹³ For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the “received date” as recorded in the Integrated Federal Employee’s Compensation System (iFECS).¹⁴ If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, it will still consider a request to be timely filed if it is received on the next business day.¹⁵

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

ANALYSIS

OWCP issued a decision on August 10, 2015, and it received appellant’s request for reconsideration on July 27, 2016. Appellant’s request was timely filed because it was received within one year of OWCP’s August 10, 2015 decision.¹⁸

The issue presented on appeal is whether appellant’s July 27, 2016 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that appellant’s request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP.

Appellant submitted various medical reports in support of her reconsideration request. The Board notes that the underlying issue in this case is whether she met her burden of proof to establish

¹¹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987, there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP decision for which review is sought.

¹⁵ *Id.* at Chapter 2.1602.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁷ *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁸ *See supra* notes 13 through 15.

partial disability for the period January 9 to April 3, 2015 due to her accepted employment conditions, and this is a medical issue which must be addressed by relevant medical evidence.¹⁹ A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.

Although appellant submitted several medical reports, dated between April 6, 2015 and July 21, 2016, none of these reports address the relevant issue of this case, *i.e.*, whether she has disability for the period January 9 to April 3, 2015 due to her accepted employment conditions. The Board has carefully reviewed these reports and notes that none of them contain an opinion regarding her claimed partial disability for the period January 9 to April 3, 2015. These reports do not require OWCP to reopen appellant's case for merit review, because the Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁰

In an August 24, 2015 report, Dr. Brown indicated that appellant could return to work on that date, but had to sit and stand as needed and take a 15-minute break every two hours. In an October 5, 2015 report, Dr. Khulusi indicated that she could return to modified work on October 5, 2015 and noted that he would continue her "on the same restrictions on the job." In the January 26, 2016 report, he indicated that appellant could return to modified work on January 26, 2016 and noted that he would continue her "on the same restrictions on the job." In a January 12, 2016 report, Dr. Herring noted with respect to her work status, "Modified duty per [Form] CA-17 of primary treating physician." However, he did not identify any particular Form CA-17. As noted, none of the reports submitted by appellant in support of her reconsideration request relate to the claimed period of partial disability (January 9 to April 3, 2015), a period which was denied by OWCP in its August 10, 2015 decision.²¹

In support of her reconsideration request, appellant also submitted reports in which Dr. Khulusi argued that she had an employment-related cervical condition.²² However, these reports do not require OWCP to reopen her case for merit review because they are irrelevant to the main issue of on reconsideration, *i.e.*, her claim for partial disability between January 9 and April 3, 2015 due to an accepted employment condition. The Board notes that OWCP did not

¹⁹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004). OWCP accepted appellant's claim for adhesive capsulitis of her left shoulder, sprain of her left shoulder/upper arm (rotator cuff), chondromalacia of her left knee patella, and displacement of lumbar intervertebral disc without myelopathy. In 2013, appellant began working as a customer care agent for the employing establishment which involved her working four days per week for approximately 10 hours each workday. She only worked approximately six hours each workday for the period January 9 to April 3, 2015 and she claimed that she had partial disability due to a worsening of her employment-related conditions.

²⁰ See *supra* note 17.

²¹ Appellant also submitted reports of an attending physical therapist, but these reports are not relevant because the main issue of this case is medical in nature. The Board has held that physical therapists are not physicians within the meaning of FECA and their reports do not constitute probative medical evidence. See *S.T.*, Docket No. 17-0913 (issued June 23, 2017) (a physical therapist is not a physician under FECA).

²² In a May 4, 2016 report, Dr. Khulusi expressed her opinion that appellant's cervical conditions were employment related and requested that OWCP expand the accepted conditions to include cervical spine degenerative disease (aggravation), cervical spine chronic myofascial strain, and cervical radiculopathy. In a report dated July 21, 2016, she asserted that there was a conflict in the medical opinion evidence regarding whether appellant sustained an employment-related cervical condition and recommended that she be referred to an impartial medical specialist.

develop the matter of whether appellant had an employment-related cervical condition and OWCP specifically indicated in its last merit decision, dated August 10, 2015, that it was not considering the matter at that time. As noted above, the Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²³ See *supra* note 17.